80-1415

FILED

FEB 23 1981

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1980
No.

EDWARD M. MURPHY, II,
Petitioner

v.

MICHAEL J. EAGEN, Individually and as Justice of the Pennsylvania Supreme Court Who Has Responsibility for Administration of Admissions to the Bar of the Commonwealth of Pennsylvania et al. (MICHAEL J. EAGEN, HENRY X. O'BRIEN, SAMUEL J. ROBERTS, ROBERT N. C. NIX, JR., LOUIS MANDERINO, ROLF LARSEN, JOHN P. FLAHERTY, as Individuals and as Justices of the Pennsylvania Supreme Court),
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Was the Petitioner's claim that he was denied due process of law by the Respondents' establishment and practice of a standardless waiver policy as to the rule of American Bar Association accreditation of bar examination applicants properly deemed moot by the Third Circuit Court of Appeals after the amendment of such rule specifically providing for no exceptions?

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980
No.

EDWARD M. MURPHY, II,
Petitioner

v.

MICHAEL J. EAGEN et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Edward M. Murphy, II, respectfully prays that a Writ of Certiorari be issued to review the judgment order of the United States Court of Appeals for the Third Circuit entered on November 10, 1980, entitled *Murphy v. Eagen,* No. 80-1752.

OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the Eastern District of Pennsylvania, No. 79-2866, has not been officially reported and is attached in the Appendix at 10a. The judgment order of the United States Court of Appeals for the Third Circuit, No. 80-1752, also has not been officially reported and is attached in the Appendix at 20a. The subsequent order of the United States Court of Appeals for the Third Circuit, No. 80-1752, denying the Petitioner's motion for a rehearing and rehearing en banc, appears in the Appendix at 22a. The order of the United States District Court for the Eastern District of Pennsylvania, No. 79-2866, vacating its original judgment and dismissing the case, appears in the appendix at 23a.

JURISDICTION

The judgment order of the United States Court of Appeals for the Third Circuit, No. 80-1752, was entered on November 10, 1980. The Petitioner's motion for a rehearing and rehearing en banc was denied on December 3, 1980.

This petition is filed within the time allowed for the filing of such petition. *See* 28 *U.S.C.* §2101(c).

The jurisdiction of this Court is invoked under 28 *U.S.C.* §1254(1).

Constitutional Provision Involved and Statement of the Case

CONSTITUTIONAL PROVISION INVOLVED

This case presents an issue arising under art. III, §2, cl. 1 of the United States Constitution, which provides in part that "The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution. . . ."

STATEMENT OF THE CASE

The Petitioner, Edward M. Murphy, II, is a graduate of Western State University School of Law, a school which although not accredited by the American Bar Association (ABA), is accredited by the Committee of Bar Examiners of the State of California and various other accrediting and government agencies. The Petitioner took and passed the California Bar Examination in 1976. The Petitioner is a member in good standing of the Supreme Court of California, the United States Court of Appeals for the Third Circuit, the United States District Court for the Middle District of Pennsylvania, and the United States District Court for the Northern District of California.

The Petitioner applied for permission to sit for the Pennsylvania Bar Examination in 1976. That application was denied because the Petitioner was not a graduate of an ABA accredited law school as is required by the Pennsylvania Bar Admission Rules. The current form of the rule

at issue is found at Rule 203(2) (Appendix 24a) (1980). After several unsuccessful appeals of the decision to the Pennsylvania Supreme Court, the Petitioner filed an action in the United States District Court for the Eastern District of Pennsylvania alleging a violation of due process in that the Respondents practiced a waiver policy as to the enforcement of the requirement of ABA accreditation without any cognizable standards or guidelines. The action was argued to have arisen under 42 U.S.C. §1983 with the jurisdiction of the court based on 28 U.S.C. §1343(3).

In an opinion and order dated April 3, 1980, Judge Weiner of the district court held, in granting a motion for summary judgment, that the Respondents had indeed been practicing a waiver policy as to the ABA accreditation rule without acknowledging the criteria upon which decisions as to the granting of a waiver were made. This was held to constitute a denial of due process to the extent that the Respondents failed to issue standards governing the waiver of the requirement. It was ordered that:

> In accordance with this opinion, and in order to comply with the due process clause of the Fourteenth Amendment, defendants [Respondents] are to issue appropriate standards and guidelines to govern the grant or denial of waivers of the ABA accreditation requirement and Pennsylvania Bar Admission Rules 203 and 205.

(Appendix 19a.)

This decision was appealed by the Respondents, not upon the grounds that there was no denial of due process, but on the grounds of *res judicata,* error in granting summary judgment, and mootness. The argument that the issue was moot was based upon the subsequent amendment

by the Respondents to the Pennsylvania Bar Admission Rules which stated that the requirement that applicants be graduates of an ABA accredited law school be enforced "without exception" (Appendix at 26a). The Respondents argued, *inter alia,* that this satisfied the district court's order to issue standards and guidelines even though such an amendment applied only to future applicants and in no way expressed the standards and guidelines relied upon by the court in declining to grant a waiver of the rule as to the Petitioner.

In an order dated November 10, 1980, the United States Court of Appeals for the Third Circuit declared that, with the adoption of the amended rule by the Respondents, the appeal was rendered moot, and it was ordered that the appeal be dismissed and the case remanded to the district court with instructions to vacate the judgment and dismiss the case as moot. No discussion or explanation of the court of appeals' reasoning was expressed in its judgment order.

It is from this order of the court of appeals that the Petitioner seeks the reveiw of this Court and the issuance of a Writ of Certiorari.

REASON FOR ALLOWANCE OF THE WRIT

The Decision of the Court of Appeals That This Case Was Rendered Moot Is in Clear Conflict With Federal Principles of Justiciability Long Established by This Court

It is axiomatic to state that the judicial power of the United States extends to all "cases" and "controversies" arising under federal law. *U.S. Const.*, art. III, §2, cl. 1; *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). The "cases" and "controversies" limitation is designed, in part, to restrict "the business of federal courts" to those "questions presented in an adversary context and in a form capable of resolution . . . through the judicial process." *Flast v. Cohen, supra*, 392 U.S. at 95. In addition, the limitation delineates the "role assigned to the judiciary . . . to assure that the federal courts will not intrude into areas committed to the other branches of government." *Id. Accord, United States Parole Commission v. Geraghty*, 445 U.S. 388, 395-96 (1980). The term justiciability is "employed to give expression to this dual limitation placed upon the federal courts by the case-and-controversy doctrine." *Flast v. Cohen, supra.*

A case will be considered not justiciable, *i.e.*, unable to meet the case-and-controversy requirement, if it is moot. *See California v. San Pablo and Tulare Railroad*, 149 U.S. 308 (1893). In *Powell v. McCormack*, 395 U.S. 486 (1969), this Court noted: "Simply stated, a case is moot

when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* at 496. It would appear clear from the circumstances of the instant case that neither element of the doctrine of mootness as expressed by this Court has been established and that the case remains an active "case" or "controversy" under article III.

The Court of Appeals for the Third Circuit, in a tersely worded judgment order, held that by the adoption of amendments to the Pennsylvania Bar Admission Rules, specifically Rule 203(2), the appeal was rendered moot (Appendix 20a-21a). Since the court of appeals did not expressly state the rationale behind this holding and there was no oral argument, it can only be assumed that it adopted the argument of the Respondents presented in their brief as appellants below (Appendix 26a-27a). The Respondents, as appellants below, contended that because "[t]he promulgation of 'waiver' standards was the only relief ordered by the court below [the district court] . . . this case has thus become moot," since the amendment of Rule 203(2), by the addition of the phrase "without exception" to the ABA accreditation requirement, satisfying the district court's order (Appendix 26a-27a). Such an interpretation of the district court's decision and order by the Respondents and ultimately by the court of appeals is unwarranted. The Petitioner, in seeking adjudication of his claim of a denial of due process in the Respondents' practice of a standardless waiver policy as to the ABA accreditation requirement, naturally sought redress which would satisfy his own prayer for relief (*see* Complaint, Appendix 6a-9a), *i.e.*, relief including the reason behind the waivers granted to others in the past so that his own ap-

plication could be ruled upon in a manner consistent with the fourteenth amendment. The addition of the phrase "without exception" to Rule 203(2), even assuming that it would qualify as the promulgation of waiver standards and guidelines, hardly offers or explains the criteria upon which the Respondents relied in granting or denying a waiver to others in the past. Such an amendment relates, if at all, only to future applicants. Neither does it grant to the Petitioner an opportunity to determine upon what bases his own prior application was considered and denied.

The district court opinion of Judge Weiner makes it clear that the Respondents' practice of a standardless waiver policy was a violation of the due process clause of the fourteenth amendment (Appendix 17a-19a). The district court found it "particularly disturbing" that the Respondents gave no reasons for denials of waivers, especially in light of the fact that at least one applicant, Thomas Sylk, and allegedly others, had been granted waivers of the requirement (Appendix 17a). In addition, the district court pointed out that, although the Respondents affirmed the decision of the Pennsylvania Board of Law Examiners refusing to allow the Petitioner to sit for the bar examination, they failed to even address the issue of waiver (Appendix 17a, n. 3).

These findings and the language of the district court cannot be ignored in interpreting the meaning of the court's order of relief. By its order the Respondents "are to issue appropriate standards and guidelines to govern the grant or denial of waivers of the ABA accreditation requirement" (Appendix 19a). The only legitimate interpretation that could possibly be offered to explain such an order is that it required the issuance of an explanation of the standards

and guidelines utilized in considering the Petitioner's prior application as well as those who had been granted waivers in the past, with the possibility that it also required the promulgation of standards and guidelines to be applied to future applicants. To limit the district court's order merely to the latter relief is contrary to the language and intent of the district court's opinion.

Considered in this light it is plain that the present controversy is not moot. By the adoption of the present amendment to Rule 203 (2), the district court's order has not been fully complied with by the Respondents. Therefore, the issue of a denial of due process in a standardless waiver policy remains "live." Because the Petitioner is still unable to sit for the Pennsylvania bar examination, he retains a "personal stake" in the ultimate outcome of the proceedings. *See United States Parole Commission v. Geraghty, supra,* 445 U.S. at 396-97. It can hardly be doubted that he lacks a "legally cognizable interest in the outcome." *See Powell v. McCormack, supra,* 395 U.S. at 496. Therefore, the elements of mootness are not present and it was error for the court of appeals to have dismissed the appeal and ordered the district court to vacate its judgment and dismiss the case.

It must be emphasized that the burden on a party alleging mootness is a heavy one. *See United States v. Concentrated Phosphate Export Association, Inc.,* 393 U.S. 199, 203 (1968); *United States v. W. T. Grant Co.,* 345 U.S. 629, 633 (1953). The Respondents have failed to meet that burden. The record is bare of any indication that the controversy between the parties herein does not survive. The Respondents' only contention is that the district court's order has been satisfied. As shown above, this con-

tention is without substantial merit. At best, the Respondents might be able to argue legitimately that the district court's order was partially satisfied with the latest amendment to Rule 203 (2) and as to that aspect of the proceedings, *i.e.*, standards and guidelines as to future applicants, the controversy is moot. However, "[w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy." *Powell v. McCormack, supra,* 395 U.S. at 497; *United Public Workers of America v. Mitchell,* 330 U.S. 75, 86-94 (1947). The remaining issue of standards and guidelines applicable to past applicants remains unresolved. Where changes or amendments to statutes or rules lead to some degree of ambiguity as to whether a case or controversy has been mooted, it is improper to resolve the debate in favor of a finding of mootness. *See Foti v. Immigration and Naturalization Service,* 375 U.S. 217, 220 n. 4 (1963).

But even this aspect of the Respondents' contention must fail. The argument that the Respondents' action in amending Rule 203 (2) by the addition of the language "without exception" satisfies the court's order ignores the interpretation given to prior forms of the rule by the Respondents themselves. The language of the prior rule implicitly provided for no exceptions to the ABA accreditation rule. In addition, the Respondents held on several occasions that the requirement would be adhered to "without deviation or exception." *See In re Appeal of Ferriman,* 487 Pa. 45, 408 A.2d 844 (1979); *In re Appeal of Kartorie,* 486 Pa. 500, 406 A.2d 746, 747 (1979). *See also Pennsylvania Bar Admission Rule* 203, Note. Yet, in spite of these pronouncements, the Respondents have waived

this requirement. (*See* District Court Opinion, Appendix 18a.) The addition of the language "without exception" to Rule 203(2), therefore, offers no greater assurance of due process protection than did the prior version and interpretation of the rule. A case may be mooted only if "subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Association, Inc., supra,* 393 U.S. at 203. *See also Vitek v. Jones,* 445 U.S. 480, 487 (1980); *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979); *Johnson v. New York State Education Department,* 409 U.S. 75, 78 (1972); and *United States v. W. T. Grant Co., supra,* 345 U.S. at 632. Such certainty that the Respondents would not continue to practice a waiver policy as to the ABA accreditation rule cannot be found in this case. Even if it were assumed that the district court's order were followed, it has been held by this Court that compliance with a court order redressing an alleged grievance will not necessarily moot a case. *See National Labor Relations Board v. Raytheon Co.,* 398 U.S. 25 (1970); *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.,* 303 U.S. 261 (1938); and *County of Los Angeles v. Davis, supra,* 440 U.S. at 643 (Dissent, Powell, J.).

Because the court of appeals in its judgment order has clearly departed from the legal principles cited and discussed in the cases above, this Court should intervene to review that judgment. Mootness is a jurisdictional issue arising under article III. *Benton v. Maryland,* 395 U.S. 784, 788, *on remand,* 8 Md. App. 388, 260 A.2d 86 (1969); *Muskrat v. United States,* 219 U.S. 346 (1911). This Court has demonstrated its eagerness to protect the juris-

dictional integrity of federal courts in a variety of situations in deciding whether to grant certiorari. *See, e.g., Thermtron Products v. Hermansdorfer,* 423 U.S. 366 (1976) (power of district court in granting removal); *Zahn v. International Paper Co.,* 414 U.S. 291 (1973) (jurisdictional amount in class actions); *Calloway v. Benton,* 336 U.S. 132 (1949) (jurisdictional conflicts between state courts and bankruptcy courts); and *Hendry Co. v. Moore,* 318 U.S. 133 (1943) (admiralty jurisdiction). The Court should not hesitate to do so here.

Finally, this Court should grant certiorari because of the public importance of the ultimate issues involved. Not only is the opportunity of the Petitioner to seek admittance to his chosen profession hindered but so is the opportunity of all those similarly situated, *i.e.,* those whose applications were denied during the existence of a waiver policy practiced without specified standards. Of even greater importance is the effect on the ability of all citizens of Pennsylvania to obtain competent and competitive legal services in light of a policy that may have allowed the admittance to the bar of unqualified attorneys yet denied admittance to qualified ones, all without the application of any measurable standards or guidelines. And perhaps the most serious effect is the damaging impression of judicial favoritism; unexplained preference degrades confidence in the integrity and impartiality of the judiciary (ABA Code of Judicial Conduct, Canons 1, 2, and 3).

Many petitions come before this Court and likely most deserve attention. However very few present a circumstance more damaging to the confidence in American jurisprudence at a time in this country's history when faith in government and its laws is desperately needed.

CONCLUSION

Because these issues have not been permitted to run their judicial course, due to the unwarranted finding of mootness, the relief of this Court is required. A Writ of Certiorari should be granted.

Respectfully submitted,

(s) Edward M. Murphy II

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

Case No. 80-1752

EDWARD M. MURPHY, II,

Appellant,

vs.

MICHAEL J. EAGEN, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for admissions to the Bar of the Commonwealth of Pennsylvania, et al., (Michael J. Eagen, Henry X. O'Brien, Samuel J. Roberts, Robert N. C. Nix, Jr., Louis Manderino, Rolf Larsen, John P. Flaherty, as individuals and as Justices of the Pennsylvania Supreme Court),

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN THAT, Edward M. Murphy, II, the appellant in the above styled cause, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Third circuit dated November 14, 1980 (rehearing

denied on December 3, 1980) holding this controversy moot and ordering dismissal of appeal and remand to the district court with instructions to vacate the judgment and dismiss the case as moot.

This appeal and review is taken pursuant to 42 U.S.C. 1984 and 28 U.S.C. 1254 (1).

Dated: December 22, 1980

(s) Edward M. Murphy, II,
Edward M. Murphy, II,
Imperial Bank Building
695 Town Center Drive, Suite 800
Costa Mesa, CA 92626
(714) 641-5905

Proof of Service

UNITED STATES COURT OF APPEALS
For the Third Circuit

Case No. 80-1752

EDWARD M. MURPHY, II,

Appellant,

vs.

MICHAEL J. EAGEN, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for admissions to the Bar of the Commonwealth of Pennsylvania et al.,

Appellees.

PROOF OF SERVICE

I, STEVEN D. SILVERSTEIN, am a resident in the County of Orangr, State of California. I am over the age of 21 and not a party to the within action; my address is 695 Town Center Drive, Suite 800, Costa Mesa, California.

On December 23, 1980, I served the foregoing document described as NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the above appellees in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Costa Mesa, Califor-

nia, addressed as follows: James D. Crawford, Esq., Schnader, Harrison, Segal & Lewis, 1719 Packard Building, Philadelphia, PA 19102. Executed on December 23, 1980, at Costa Mesa, CAlifornia.

(s) Steven D. Silverstein
STEVEN D. SILVERSTEIN

State of California
County of Orange ss:

On December 23, 1980, before me, a notary public, personally appeared Steven Silverstein known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that —he— executed the same.

(s) Gail E. Marlin
GAIL E. MARLIN

GAIL E. MARLIN
Notary Public California
Principal Office in Orange County
(Seal)

Proof of Service

UNITED STATES COURT OF APPEALS
For the Third Circuit

Case No. 80-1752

EDWARD M. MURPHY, II,

Appellant,

vs.

MICHAEL J. EAGEN, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for admissions to the Bar of the Commonwealth of Pennsylvania et al.,

Appellees.

ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT

I, James D. Crawford, hereby acknowledge the receipt of a copy of the NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, in the above action, this 29th day of December 1980.

I am the counsel of record for all appellees herein.

Dated: December 29, 1980

(s) James D. Crawford
James D. Crawford

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-2866

IN RE: Edward M. Murphy, II

Plaintiff

vs.

Michael J. Eagen, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania,

Henry X. O'Brien, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania,

Samuel J. Roberts, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania,

Robert N. C. Nix, Jr., individually and as a justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania,

Louis L. Manderino, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania,

Rolf Larsen, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania,

John P. Flaherty, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania,

Defendants.

COMPLAINT

---

1. Plaintiff is a citizen and resident of the State of Pennsylvania.

2. The Defendants are citizens of the State of Pennsylvania.

3. This action arises under 42 *U.S.C.* 1983. The jurisdiction of this court lies under 28 *U.S.C.* 1343 (3).

4. At all times pertinent to this complaint, the Defendants were justices of the Pennsylvania Supreme Court, acting under color of state law, specifically, their well-recognized power to regulate admission to the practice of law.

5. Under Pennsylvania Bar Admission Rules 203 and 205, one of the requirements for admission to the bar is that the applicant be a graduate of a law school accredited by the American Bar Association or an equivalent foreign school. This requirement was formerly embodied in Rule 8-C-2.

6. This requirement may be waived by the Pennsylvania Supreme Court. The requirement was waived in the

case of Thomas Sylk and others. All of these individuals had graduated from law schools not accredited by the ABA, but were nonetheless deemed eligible for the Pennsylvania Bar.

7. The Pennsylvania Supreme Court gave no reasons why the requirement was waived in these cases.

8. There are no standards or guidelines governing this waiver practice.

9. Plaintiff, a graduate of Western State University School of Law and a member of the California Bar, sought admission to the Pennsylvania Bar. In November 1976, Plaintiff's application was rejected by the Board because Western State Law School has not been accredited by the ABA. On December 23, 1977, this ruling was affirmed by the Pennsylvania Supreme Court.

10. Upon discovering that the ABA accreditation requirement had been waived by the Pennsylvania Supreme Court in the cases of Thomas Sylk and others, Plaintiff sought a similar waiver.

11. Plaintiff's request for such waiver was denied. The majority's ruling did not distinguish or even mention the cases in which waivers were granted to Sylk and the others, despite the fact that Plaintiff urged these as precedent for granting a waiver in his case. In fact, the opinion actually went so far as to intimate that there was no waiver practice and that it was simply impossible for a graduate of a law school not accredited by the ABA to become eligible for the Pennsylvania Bar.

12. Plaintiff appealed this decision to the Supreme Court of the United States. This appeal was dismissed and

certiorari denied for want of jurisdiction. 47 U.S.L.W. 1644. Plaintiff had not adequately presented his challenge to the constitutionality of the waiver practice in the court below.

13. The denial of Plaintiff's request for a waiver was a violation of rights guaranteed him by the Fourteenth Amendment in that the waiver practice promulgated by the Defendants is not governed by standards and is administered in an arbitrary, capricious and unequal fashion, all of which renders bar admission, in cases where the applicant has graduated from a school not accredited by the ABA, a matter of grace and favor of the Defendants. This practice violates the Plaintiff's right to equal protection of the laws as guaranteed by the Fourteenth Amendment.

14. Plaintiff has incurred considerable expense in seeking application to the bar under the waiver practice.

15. WHEREFORE, Plaintiff prays that this court enjoin the Defendants to bring the waiver practice up to Constitutional standards by publishing guidelines governing the dispensation of waivers and by explaining the reasons behind the waivers granted to Sylk and the others, so that Plaintiff's application for waiver may be ruled upon in a manner consistent with the Fourteenth Amendment. Further, Plaintiff prays for such other relief as the Court deems just and proper.

(s) Edward M. Murphy II
Plaintiff
Edward M. Murphy II
505 Lombard Street
Philadelphia, PA 19147
(215) 922-2654 (717) 346-1971

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 79-2866

In Re: EDWARD M. MURPHY,

vs.

MICHAEL J. EAGEN, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania,

and

HENRY X. O'BRIEN, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania,

and

SAMUEL J. ROBERTS, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania,

and

ROBERT N. C. NIX, JR., individually and as a justice of the Pennsylvania Supreme Court who has the responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania,

and

LOUIS L. MANDERINO, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania,

and

ROLF LARSEN, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania,

and

JOHN P. FLAHERTY, individually and as a justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania.

MEMORANDUM OPINION AND ORDER

WEINER, J., APRIL 3, 1980

Plaintiff, a citizen and resident of Pennsylvania instituted this action, against the Chief justice and associate justices of the Supreme Court of Pennsylvania, alleging a violation of his Constitutional rights. The parties have submitted a stipulation of facts. Presently before the Court are the defendants' motion to dismiss and the plaintiff's motion for summary judgment. For the reasons to follow, we grant the plaintiff's motion, and deny the defendants' motion.

Plaintiff is a 1976 graduate of Western State University School of Law, ("Western State") located in Fullerton, California, and is a member of the bar of the State of California, having taken and passed the California Bar

Examination in 1976. Western State is not accredited by the American Bar Association, ("ABA"), although it is accredited by the Committee of Bar Examiners of the State of California and various other accrediting and government agencies. Plaintiff has been admitted to and is a member in good standing of the Supreme Court of California, the United States Court of Appeals for the Third Circuit, the United States District Court for the Middle District of Pennsylvania, and the United States District Court for the Northern District of California.

Sometime before October 31, 1976, plaintiff applied to the Pennsylvania Board of Law Examiners, ("Board"), for permission to take the Pennsylvania bar examination. On November 24, 1976, Plaintiff was informed by the Board that his application had been denied because he had not graduated from an ABA approved law school, as required by Pennsylvania Supreme Court Rules.[1] Plaintiff's appeal from the Board's decision to the Supreme Court of Pennsylvania was denied, without opinion, on December 23, 1976.

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[1] The rules governing admission to the Pennsylvania Bar were amended in 1971, 1976, and 1977. The 1971 changes, *inter alia*, rescinded Supreme Court Rule 8 and amended Supreme Court Rule 10. Rule 10-c-2 required that "to qualify for the bar examination an applicant . . . shall have completed the study of law in a law school accredited by the American Bar Association." The 1976 changes permitted a person to sit for the bar examination if he or she "shall have acquired a legal education which in the opinion of the State Board is the equivalent of the education received in an ABA approved school." The 1977 changes redesignated and amended Supreme Court Rules 7 through 16 as the Pennsylvania Bar Admission Rules. The current form of these rules are Pa. B.A.R. 203(2) and 205. 471 Pa. lxxix.

On September 10, 1977 Plaintiff again applied to the Board for permission to take the Pennsylvania bar examination. The Board, on October 3, 1977, again denied the application because Plaintiff had not graduated from an ABA approved school. Plaintiff's appeal of the Board's decision to the Supreme Court of Pennsylvania was again denied on October 5, 1978.

Rule 203 of the Pennsylvania Bar Admission Rules provides in pertinent part:

> "The general requirements for admission to the bar of this Commonwealth are:
>
> (2) Receipt of an earned Bachelor of Laws or Juris Doctor degree from an accredited law school. See Rule 205 (relating to admission of foreign attorneys) for standards applicable to graduates of foreign law school."

Rule 205 of the Pennsylvania Bar Admission Rules provide in pertinent part:

> "The Board, under such standards, rules and procedures as it may prescribe, may extend the provisions of Rule 203 (relating to the admission of graduates of accredited institutions) to any applicant who has completed the study of law in a law school which at the time of such completion was not located within the geographical area encompassed by the accreditation activities of the American Bar Association and who has been admitted to practice law in and is in good standing at the bar of a foreign country, as evidenced by a certificate from the highest court or agency of such foreign country having jurisdiction over admission to the bar and the practice of law.

Note: This rule makes clear that the Board does not have the power to entertain applications from persons who have 'read law' in a law office, studied law in the United States in unaccredited law schools, etc."

Rule 222 of the Pennsylvania Bar Admission Rules provides in pertinent part:

"(a) Except as prescribed by Rule 221 (relating to marking of bar examination papers) any final determination of the Board may be reviewed by the Supreme Court."

Plaintiff alleges that the Pennsylvania Supreme Court engages in a "waiver practice" whereby the ABA accreditation requirement is waived for *some* graduates of non-ABA approved law schools, who are permitted to take the Pennsylvania Bar Exam. Plaintiff's claim is that these waivers are dispensed in a way which violates the due process and equal protection clauses of the Fourteenth Amendment.

To support his claim, Plaintiff points to the case of one Thomas Sylk. At the time of Sylk's graduation from the Eastern College of Commerce and Law in 1966, that law school was not accredited by the ABA. The school merged with another non-ABA accredited law school, the University of Baltimore School of Law, in 1970, which was subsequently accredited by the ABA in 1972. On January 24, 1977, Sylk applied to the Board for permission to take the Pennsylvania bar examination. The application was denied on March 18, 1977 because Slyk had not graduated from an ABA accredited law school.

Sylk appealed the Board's decision to the Supreme Court of Pennsylvania, which on June 6, 1977 reversed the

Board and permitted Sylk to sit for the Pennsylvania bar examination. Plaintiff notes that his second application to the Board and appeal to the Supreme Court were denied after permission to take the exam had been given to Sylk.

Plaintiff has previously challenged in federal court the ABA accredited law school requirement itself and the action of the Board and the Pennsylvania Supreme Court on equal protection grounds. *Murphy v. State Board of Law Examiners for the Commonwealth of Pennsylvania,* 429 F. Supp. 16 (E.D. Pa. 1977). That court dismissed the complaint for failure to state a cause of action for which relief could be granted. In so ruling, the court held that the state, in classifying bar applicants into a class of ABA accredited law school graduates and a class of non-ABA accredited law school graduates is not violating the equal protection clause of the Fourteenth Amendment. The rules governing admission to the Pennsylvania bar, requiring graduation from an ABA approved law school were held not to involve a suspect classification or invidious discrimination, see *In Re Griffiths,* 413 U.S. 717 (1973), but rather are a classification rationally related to the state's valid interest in assuring professional competence and protection of the public. Since a suspect classification is not involved, our scrutiny of the wisdom of the state's action is limited. *Murphy,* 429 F. Supp. at 18.

The defendants seek the dismissal of the plaintiff's equal protection claim on res judicata grounds. However, because we agree that the ABA accreditation requirement does not violate the equal protection clause, we need not delve into the res judicata issue. The defendants prevail on the merits of that claim. The defendants' assertion that plaintiff's due process claim must be dismissed on res

judicata grounds cannot be accepted, because after close examination of the court's opinion in *Murphy,* supra, we have found no indication of the court passing upon the merits of plaintiff's due process claim. It appears to us that the due process claim was not an issue in that case, and that the case was limited in scope to the equal protection claim. Thus, since this is the first time a due process claim has been raised, we shall address it on the merits.

Plaintiff does not challenge the requirement that a candidate must attend an ABA approved law school or foreign law school,[2] nor does he challenge the waiver process per se as a means of determining eligibility for the bar. Rather, plaintiff's contention is that the waivers may not be granted in a manner which violates the Fourteenth Amendment guarantee of Due Process. Plaintiff argues that the waivers can not be arbitrarily granted or withheld, without reason and guiding standards.

Plaintiff asserts that the Pennsylvania Supreme Court has given no reasons as to why he or any other applicant

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[2] Without making any determination as to the Constitutionality or wisdom of such a provision, we find it odd that in the interest of protecting the public through regulation and oversight of the qualifications and competence of those seeking to be admitted to the bar of the Commonwealth, the Board and the Supreme Court deem those who have graduated from foreign law schools and who have been admitted to practice in foreign countries to be qualified to practice law in the courts of Pennsylvania if they also pass the bar examination, yet denies the opportunity to take the exam and, if successful practice in Pennsylvania to those who have not only graduated from an American law school, albeit not one meeting ABA approval, but who have in fact been admitted to and have been actually engaged in the practice of law in sister states.

for admission to the bar has not received a waiver.[3] This is particularly disturbing in light of the fact that at least one, Thomas Sylk, and allegedly other applicants have been granted waivers of the requirement. Plaintiff's position is that the Court must establish standards to be followed in the waiver procedure.

It is significant that plaintiff does not ask this court to pass on the validity of specific substantive requirements promulgated by the Board and the Pennsylvania Supreme Court in regard to bar admission. If faced with such a situation, we would be reluctant to substitute the judgment of a federal court for that of the high court of a state in a matter properly within the latter's province.[4] But plaintiff's claim is a constitutional challenge to the *operation* of the state's bar admission scheme, not to the actual substantive requirements of that scheme. We are not asked to substitute our judgment for that of the State of Pennsylvania regarding the qualifications necessary for admission to the bar. Pennsylvania, in its wisdom, has chosen to require graduation from an ABA approved law school or foreign law school as a requirement for taking the State bar exami-

---

[3] The court did issue an opinion in which it affirmed the Board's refusal to allow plaintiff to sit for the Pennsylvania bar examination. No. 8 Misc. Docket No. 1978. However, the opinion did not address the *waiver* of the ABA accreditation requirement. Rather, the Court defended the validity of the requirement as a condition for admission to the bar, and reliance on the ABA and its accreditation process.

[4] That is, absent some fatal defect such as an improper classification based on race, sex, or alienage. *See, e.g., In Re Griffiths*, 413 U.S. 717 (1973). Of course, other improper classifications of constitutionally defective requirements are conceivable, and must be considered by a court if raised.

nation. We are not asked to rule on the merits of the provision itself, and as we have indicated would have serious reservations about striking it merely because we might prefer some other scheme. Yet, Pennsylvania has also decided to permit the waiver of the ABA approved school requirement. In doing so it had made available to bar applicants who do not meet the requirement an ad hoc procedure by which they may nevertheless seek admission. Such an admissions procedure, administered by means of the waiver, must be operated in accordance with the due process guarantees of the Fourteenth Amendment. Waivers may not be granted or denied arbitrarily or capriciously, or without definable reasons or standards. In the absence of any guiding principles which may be pointed to as forming the basis of a waiver decision there is no indication that due process has been adhered to. There is no intimation of the rational basis on which the Court's discretion has been exercised. Due process will not allow the exercise of unfettered discretion, or the use of improper criteria. While we have no reason to believe nor do we mean to infer that this or any other waiver decision was the result of an improper exercise of discretion in violation of the Fourteenth Amendment, we simply do not know, and neither do plaintiff or other graduates of non-ABA accredited law schools who wish to be admitted to the bar in Pennsylvania. No reasons have been given, and no standards and guidelines for issuance or denial of waivers have been established. Applicants for admission to the bar by the way of the waiver procedure are entitled to know the criteria which must be met in order to be granted a waiver.

This court can not order that plaintiff be allowed to take the Pennsylvania bar examination. To do so would in

effect abolish the ABA accreditation rule, and, as we have said, that rule and all others pertaining to the qualifications required for admission to the bar in Pennsylvania are properly established by the Pennsylvania Supreme Court and the Board of Law Examiners. Neither is it proper for this court to inquire further into the relative qualifications of the plaintiff and of Sylk (or any other non-ABA school graduates). It is not for us to ascertain whether plaintiff is entitled to a waiver of the ABA accreditation requirement, or to speculate as to the reasons the Court permitted Sylk, but not plaintiff, to take the bar examination.

Furthermore, we in no way mean to imply that the Court acted improperly in regard to these decisions except to the extent that it failed to issue standards governing the waiver of the requirement.

In accordance with this opinion, and in order to comply with the due process clause of the Fourteenth Amendment, defendants are to issue appropriate standards and guidelines to govern the grant or denial of waivers of the ABA accreditation requirement and Pennsylvania Bar Admission Rules 203 and 205.

Judgment Order

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 80-1752

MURPHY, EDWARD M. II

vs.

EAGEN, MICHAEL J., individually and as justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania et al.

Michael J. Eagen, Henry X. O'Brien, Samuel J. Roberts, Robert N. C. Nix, Jr., Louis L. Manderino, Rolf Larsen and John P. Flaherty, the Justices of the Supreme Court of Pennsylvania,

Appellants

(D.C. Civil No. 79-2866)

On Appeal From the United States District Court for the Eastern District of Pennsylvania

---

Submitted Under Third Circuit Rule 12(6) November 7, 1980 Before GIBBONS and WEIS, *Circuit Judges,* and WHIPPLE, *District Judge.*

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JUDGMENT ORDER

This appeal having been rendered moot by the adoption, subsequent to the date of the order appealed from, of an amendment to Rule 203 (2) of the Pennsylvania rules governing admission to the bar, it is

ORDERED that the appeal be and is hereby dismissed and the case remanded to the district court with instructions to vacate the judgment and dismiss the case as moot. No Costs.

By the Court,
(s) John J. Gibbons
Circuit Judge

Attest
(s) Sally Mrvos
Sally Mrvos, Clerk

Dated: Nov 10 1980

Certified as a true copy and issued in lieu of a formal mandate on December 11, 1980.

Test: (s) M. Elizabeth Ferguson
Chief Deputy Clerk,

U.S. Court of Appeals for the Third Circuit

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 80-1752

EDWARD M. MURPHY, II,

Appellee,

v.

MICHAEL J. EAGEN, individually and as justice of the Pennsylvania Supreme Court who has responsibility for administration of admissions to the Bar of the Commonwealth of Pennsylvania et al.
Michael J. Eagen et al.,

Appellants

Sur Petition for Rehearing

Present: SEITZ, *Circuit Judge*, ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*.

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
(s) John J. Gibbons
Judge

Dated: December 3, 1980

District Court Order December 29, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. No. 79-2866

EDWARD M. MURPHY, II

vs.

MICHAEL J. EAGEN ET AL.

ORDER

WEINER, J., DECEMBER 29, 1980

In accordance with the instructions to this Court by the United States Court of Appeals for the Third Circuit, the judgment entered by this Court by Memorandum Opinion and Order dated April 3, 1980, is vacated, and the case dismissed as moot.

IT IS SO ORDERED.

(s) Charles R. Weiner
CHARLES R. WEINER

IN THE SUPREME COURT OF PENNSYLVANIA

No. 57, Supreme Court Rules
Docket No. 1

IN RE: PENNSYLVANIA BAR ADMISSION RULES

ORDER

AND NOW, this 25 day of April, 1980, pursuant to Article V, Section 10 of the Constitution of Pennsylvania, Rule 203 (2) of the Pennsylvania Bar Admission Rules is hereby amended to read:

> "(2) Receipt without exception of an earned Bachelor of Laws or Juris Doctor degree from an accredited law school. See Rule 205 (relating to admission of foreign attorneys) for standards applicable to graduates of foreign law schools."

Effective immediately.

BY THE COURT,
(s) Michael J. Eagen
Chief Justice

Mr. Justice Larsen and Mr. Justice Flaherty dissent.

True Copy From Record
Attest:
(s) Sally Mrvos
Sally Mrvos, Esquire
Prothonotary

The following sentences are added at the end of the Note to Rule 203 of the Pennsylvania Bar Admission Rules:

> Decisions of the Supreme Court establish that the requirement of graduation from a law school accredited by the American Bar Association shall be strictly observed. *Appeal of Kartorie,* Pa. , 406 A.2d 746 (1979); *Appeal of Ferriman,* Pa. , 408 A.2d 844 (1979). See Note to Bar Admission Rule 205.

(This Note as amended is not a part of Rule 203 of the Pennsylvania Bar Admission Rules as promulgated by the Supreme Court of Pennsylvania.)

APPELLANT'S ARGUMENT

* * * * * *

III. TO THE DEGREE THAT APPLICANT SOUGHT TO FORCE THE SUPREME COURT OF PENNSYLVANIA TO DECLARE UNDER WHAT CIRCUMSTANCES, IF ANY, IT WOULD "WAIVE" THE REQUIREMENT THAT AMERICAN LAW STUDENTS SEEKING ADMISSION TO ITS BAR BE GRADUATES OF ACCREDITED LAW SCHOOLS, THIS CASE IS MOOT

On April 25, 1980, after the court below had assumed the existence of a "waiver" policy with respect to the ABA-accreditation requirement, the Supreme Court of Pennsylvania amended Rule 203 (2) of the Pennsylvania Bar Admission Rules to provide that the requirement applies "without exception." (9b-10b) Although the stated purpose of the amendment is to reflect decisions of the Supreme Court of Pennsylvania that the ABA-accreditation requirement "shall be strictly observed" (10b), the amendment does satisfy the lower court's order that the Supreme Court of Pennsylvania promulgate rules defining the circumstances under which it will permit waiver of the accreditation requirement. The "waiver" standards are now absolutely explicit: there are *no* circumstances under which the ABA-accreditation requirement will be waived.

The promulgation of "waiver" standards was the only relief ordered by the court below. In light of Mr. Murphy's failure to take any steps whatsoever to appeal from the limited relief decreed by Judge Weiner (1a-2a, 100a-

106a), this case has thus become moot, since it has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall v. Beals,* 396 U.S. 45, 48 (1969). Accordingly, accepted federal practice dictates that this Court should vacate the judgment below and remand the case with a direction to dismiss the complaint. *United States v. Munsingwear,* 340 U.S. 36, 39 (1950); *see Marshall v. Whittaker Corp., Berwick Forge & Fabricating Co.,* 610 F.2d 1141, 1145 (3d Cir. 1979).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 79-2866

EDWARD M. MURPHY, II

Plaintiff,

v.

MICHAEL J. EAGEN et al.,

Defendants

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the undersigned plaintiff and attorney for defendants that:

1. Plaintiff is a citizen and resident of the Commonwealth of Pennsylvania.

2. Plaintiff was graduated by Western State University College of Law, located in Fullerton, California, a law school not accredited by the American Bar Association ("ABA"), in 1976.

3. Defendants are the Chief Justice and the Associate Justices of the Supreme Court of Pennsylvania.

4. At all times pertinent to the complaint herein, the defendants were acting under Pennsylvania state law,

specifically, their power to regulate the admission to the practice of law within the Commonwealth of Pennsylvania.

5. Sometime before October 31, 1976, plaintiff applied to the Pennsylvania Board of Law Examiners ("Board") for permission to take the Pennsylvania bar examination.

6. On November 24, 1976, plaintiff was informed by the Board that his application had been denied because he had not been graduated from a law school accredited by the American Bar Association as required by Pennsylvania Supreme Court Rule 8-C-2.

7. On December 17, 1976, plaintiff filed an appeal from the Board's decision with the Supreme Court of Pennsylvania. This appeal was denied, without opinion, on December 23, 1976.

8. Thomas Meredith Sylk was graduated by the Eastern College of Commerce and Law in 1966. At the time of his graduation, that law school was not accredited by the ABA. On September 1, 1970, that law school was merged with the University of Baltimore School of Law, another institution not accredited by the ABA. On August 17, 1972, the University of Baltimore School of Law became accredited by the ABA.

On January 24, 1977, Sylk applied to the Board for permission to sit for the Pennsylvania bar examination. On March 18, 1977, the Board declined his application because he had not been graduated from a law school accredited by the ABA.

9. On May 18, 1977, Sylk appealed the Board's decision to the Supreme Court of Pennsylvania.

Stipulation of Facts

10. On June 6, 1977, the Supreme Court of Pennsylvania reversed the Board's decision and permitted Sylk to sit for the Pennsylvania bar examination as of No. 376, Miscellaneous Docket No. 21.

11. On September 10, 1977, after Sylk had been permitted to sit for the Pennsylvania bar examination, plaintiff again applied to the Board for permission to take the Pennsylvania bar examination.

12. On October 3, 1977, the Board notified plaintiff that it was again denying his application because he had not been graduated from a law school accredited by the American Bar Association.

13. On February 2, 1978, plaintiff again appealed the decision of the Board to the Supreme Court of Pennsylvania which, by opinion filed October 5, 1978, denied the appeal.

14. The opinions and orders mentioned in this Stipulation are the only explanation of the decision to permit Thomas Meredith Sylk to sit for the Pennsylvania bar examination and to deny plaintiff permission to do so.

(s) Edward M. Murphy, II
Edward M. Murphy, II
Plaintiff Pro Se
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(s) James D. Crawford
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MAR
ALEXANDER L. STEVAS
CLERK

No. 80-1415

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EDWARD M. MURPHY, II,

Petitioner

v.

MICHAEL J. EAGEN, Individually and as a Justice of the Pennsylvania Supreme Court Who Has Responsibility for Administration of Admissions to the Bar of the Commonwealth of Pennsylvania, et al. (MICHAEL J. EAGEN, HENRY X. O'BRIEN, SAMUEL J. ROBERTS, ROBERT N.C. NIX, JR., LOUIS MANDERINO, ROLF LARSEN, JOHN P. FLAHERTY, as Individuals and as Justices of the Pennsylvania Supreme Court),

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Bernard G. Segal*
James D. Crawford
Attorneys for Respondents

SCHNADER, HARRISON, SEGAL & LEWIS
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Of Counsel

*Counsel of Record for Respondents

QUESTION PRESENTED FOR REVIEW

When petitioner sought only affirmance of a District Court order that respondent Justices of the Supreme Court of Pennsylvania "issue appropriate standards and guidelines to govern the grant or denial of waivers of the ABA accreditation requirement and [the Pennsylvania Bar Admission Rules embodying that requirement]," was not petitioner's case made moot by the amendment of the accreditation rule to require receipt "without exception" of a degree from an ABA accredited law school?

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STATEMENT OF THE CASE

Petitioner is a graduate of Western State University School of Law, a law school which has never been accredited by the American Bar Association ("ABA"). In 1976, petitioner applied to the Pennsylvania Board of Law Examiners (the "Board") for permission to take the Pennsylvania Bar Examination. His application was denied because he was not a graduate of an ABA-accredited law school as required by the Supreme Court of Pennsylvania's Rule 8-C-2. Petitioner appealed the Board's decision to the Supreme Court of Pennsylvania, which denied relief without opinion.

In 1977, petitioner instituted suit in the United States District Court for the Eastern District of Pennsylvania

attacking the constitutionality of Rule 8-C-2 on due process and equal protection grounds. The court concluded that the accreditation requirement was rationally related to a valid state objective and did not violate any of petitioner's constitutional rights. Thus, the complaint was dismissed for failure to state a cause of action for which relief could be granted. Murphy v. State Board of Law Examiners, 429 F. Supp. 16 (E. D. Pa. 1977). Petitioner did not appeal the decision.

Petitioner then re-applied for permission to sit for the Pennsylvania Bar Examination. The Board's denial was again affirmed by the Pennsylvania Supreme Court. Appeal of Murphy, 482 Pa. 43, 393 A.2d 369 (1970). Petitioner filed an appeal to this Court. The

appeal was dismissed for want of jurisdiction and, treating the appeal papers as a petition for certiorari, the Court denied certiorari. 440 U.S. 901 (1979).

On August 6, 1979, petitioner instituted his second federal court action in the Eastern District of Pennsylvania, again alleging that the application of Pennsylvania's requirement that candidates for admission to the bar be graduated from an ABA-accredited law school, now contained in Rules 203 and 205 of the Pennsylvania Bar Admission Rules, violated his constitutional rights. Respondents moved to dismiss the Complaint on res judicata grounds, and petitioner moved for summary judgment. Without ruling on either motion, the District Court requested the parties to enter into a stipulation of facts (28a-30a) which was filed on March 13,

1980.[1] On April 8, 1980, the District

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1. Petitioner's original federal complaint had alleged a violation of the Equal Protection Clause in that he had been treated differently from others who had been admitted to the Pennsylvania bar although they had not graduated from an ABA-accredited law school. The Complaint in this case alleged a due process violation in that the Pennsylvania Supreme Court had never promulgated standards for the "waiver" of the ABA-accreditation requirement.

   Although petitioner's Complaint alleged that the Pennsylvania Court had "waived" the requirement as to one Thomas Sylk "and others" (7a-8a, ¶6), respondents had not yet filed an answer in which that allegation could be admitted or denied at the time the District Court granted summary judgment for petitioner. The Stipulation of Facts entered by the parties stated only that Thomas Sylk was graduated from a law school which was not accredited by the ABA at the time, that the school was merged with another unaccredited law school, that the successor school was accredited by the ABA in 1972 (29a, ¶8), and that Sylk was finally permitted to sit for the Pennsylvania bar examination by order of the Supreme Court of Pennsylvania in 1977 (30a, ¶10). There was no other factual basis for the decision of the District Court.

Court granted petitioner's motion for summary judgment and ordered respondents "to issue appropriate standards and guidelines to govern the grant or denial of waivers of the ABA accreditation requirement...." (19a).

Respondents appealed to the United States Court of Appeals for the Third Circuit. While that appeal was pending, the Supreme Court of Pennsylvania amended the Pennsylvania Bar Admission Rules to make it explicit that no exceptions to the accreditation rule would be recognized. Accordingly, respondents brief on appeal urged reversal of the decision of the District Court not only on the grounds that the claim was barred by res judicata and that the court erred in granting summary judgment

in the face of contested issues of material fact, but also on the ground that the case was moot.

In a Judgment Order dated November 10, 1980, the Court of Appeals held that the amendment of the accreditation rule rendered the appeal moot, and ordered that the appeal be dismissed and the case remanded to the District Court with instructions to vacate the judgment and dismiss the case as moot. Reargument was denied.

Petitioner seeks a Writ of Certiorari to review this order of the Court of Appeals.

REASONS FOR DENYING THE WRIT

There are three clear reasons for denying certiorari in this case. First, there can be no dispute that litigation should be dismissed if the case has become moot; the only question is the factual one of whether this specific case is moot. Therefore any decision in this case, should the Court grant certiorari, would be of limited precedental value. Second, the decision of the Court of Appeals is clearly correct and in conflict with neither any decisions of this Court nor any decisions of other courts of appeals. Finally, since the District Court erred when it failed to dismiss the Complaint on res judicata grounds, there is another independent basis for upholding the judgment of the Court of Appeals

which is so clear that a decision for petitioner in this case would give him no real relief.

I. This Case Presents No Significant Question Concerning the Rule that Federal Courts Should Not Decide Moot Cases.

Article III of the Constitution imposes a "threshold requirement ... that those who seek to invoke the power of federal courts must allege an actual case or controversy." O'Shea v. Littleton, 414 U.S. 488, 493 (1974); U.S. Const., Art. III, §2, cl. 1. Moreover, the firmly established rule in federal cases is that an actual controversy must exist at all stages of appellate review, not merely at the time the complaint is filed. Preiser v. Newkirk, 422 U.S. 400 (1975); Steffel v. Thompson, 415 U.S. 452, 459 n.10 (1974); Roe

v. Wade, 410 U.S. 113 (1973); SEC v. Medical Commission for Human Rights, 404 U.S. 403 (1972); United States v. Munsingwear, Inc., 340 U.S. 36 (1950). Thus, the federal courts have avoided giving advisory opinions by refusing to exercise jurisdiction over cases which are no longer live.

Once the Court of Appeals determined that the amendment of the state Rule mooted respondents' appeal, it acted in accordance with the long-established procedure of the federal courts in vacating the judgment below and dismissing petitioner's case. Crowell v. Mader, 100 S. Ct. 25 (1979); Great Western Sugar Co. v. Nelson, 442 U.S. 92 (1979); Hopper v. Barnett, 439 U.S. 1041 (1978); United States v. Munsingwear, Inc., supra. This rule applies even where an appellant moots

the case by his own action. Board of Regents v. New Left Educational Project, 414 U.S. 807, rev'g, 472 F.2d 218 (5th Cir. 1973). Thus, the appellate court's dismissal of the action was required by established precedent.

In fact, the present case does not deal with the question of what should be done if a case becomes moot. Rather, the question presented is merely whether the Court of Appeals correctly ruled that the case had become moot upon the amendment of the relevant Pennsylvania Bar Admission Rules. There is no suggestion in the Petition for Certiorari that there is a need for clarification of the meaning of mootness or that the facts of this case are likely to recur. Indeed, since the Supreme Court of Pennsylvania had renounced any possible "waiver" policy in its 1979

decisions in In re Ferriman, 487 Pa. 45, 408 A.2d 844 (1979), and In re Kartorie, 486 Pa. 500, 406 A.2d 746 (1979), and had prohibited "waiver" of the ABA-accreditation policy by its 1980 amendment to Rule 203, it is unlikely that any case other than petitioner's challenging the alleged pre-1979 practice remains open to be controlled by a decision of this Court. Nor does petitioner suggest that a similar mootness problem exists in any other jurisdiction to which this Court's decision would apply, or that the decision below conflicts with any decision of this Court or the courts of any other circuit. In other words, none of the criteria set forth in Rule 17 of this Court's Rules is met.

A review of the cases indicates that since this Court announced

the rule that moot cases should be dismissed in United States v. Hamburg-American Co., 239 U.S. 466 (1916), it has never granted certiorari simply to determine whether a given case is moot. Apart from rare cases like Duke Power Co. v. Greenwood County, 299 U.S. 259 (1936), and United States v. Munsingwear, 340 U.S. 36 (1950), which either enforced the Hamburg-American rule or defined its perimeters, this Court has dealt with the mootness issue when a change of circumstances intervened between the decision below and the disposition of the case by the Court. Except in the most unusual of circumstances, absent here, there is no reason for this Court to reexamine a decision by a court of appeals that the case is already moot at that level.

II. This Case Was Plainly Mooted by the Adoption of the Amendment to the Pennsylvania Bar Admission Rules.

In any case, the Court of Appeals properly decided that this case was moot in light of the adoption of the amendment to Rule 203(2) of the Pennsylvania Bar Admission Rules explicitly setting forth the standards for waiver of the accreditation requirement. Petitioner's position in the District Court was that respondents "must establish standards to be followed in the waiver procedure." (17a). On the basis of a single exception to the rule, the District Court assumed a waiver policy existed, and ordered respondents "to issue appropriate standards and guidelines to govern the grant or denial of waivers of the ABA accreditation requirement." (19a). While the appeal

was pending in the Court of Appeals, the Supreme Court of Pennsylvania amended its rules to make it clear that the accreditation requirement would be enforced in all circumstances; "waivers" of the requirement would not be permitted. Petitioner has received the ordered relief. Thus, the case has "lost its character as a present, live controversy," and should be dismissed as moot. Hall v. Beals, 396 U.S. 45, 48 (1969).

Petitioner suggests that the amendment to the Pennsylvania Bar Admission Rules was not enough to comply with the District Court's order since it offered no basis for determining whether he might come within the alleged "waiver" policy. But even if the fact that Thomas Sylk had been permitted to sit for the bar examination indicated that the Supreme Court of Pennsylvania

had had a "waiver" policy under the pre-existing Supreme Court Rules relating to bar admission, the new Pennsylvania Bar Admission Rules which became effective on November 4, 1977, before petitioner's unsuccessful appeal to the Supreme Court of Pennsylvania, are not alleged to have been subject to any such "waiver." Moreover, the Supreme Court of Pennsylvania had held that no exceptions to the ABA-accreditation requirement would be permitted under the new bar admission rules even before petitioner filed his motion for summary judgment asking that such a "waiver" policy be defined by that court. See In re Ferriman, supra; In re Kartorie, supra. Thus, there was no "waiver" policy whose standards respondents could have announced in compliance with the District Court's order except for the

absolute prohibition against exceptions to the ABA-accreditation requirement.

What petitioner seems to believe the order of the District Court required of respondents was the issuance of guidelines to explain the granting of permission to sit for the bar examination to a law student whose school was only accredited after his graduation even though that explanation would apply only to that case. In addition, petitioner would ask that he be admitted under the same rule even though his law school has never become accredited and even though his case was decided by the Supreme Court of Pennsylvania under new Rule 203. In other words, petitioner interprets the District Court's order as giving him an opportunity to be admitted to the Pennsylvania bar under

standards which no longer applied to anyone else at the time his application was rejected, if they ever did. Nothing in the District Court's order suggests that it granted such broad relief.

Moreover, regardless of the adequacy of the relief ordered below or of respondents' compliance therewith, the ruling of the Court of Appeals was correct because a cause of action based upon a statute or regulation may be mooted if that statute or regulation is amended after the filing of the complaint. See Kremens v. Bartley, 431 U.S. 119 (1976); Hall v. Beals, 396 U.S. 45 (1969). The meaning of the amended rule and petitioner's rights thereunder could not be any clearer. Thus, the enactment of a superseding regulation which satisfies petitioner's attack on the prior "standardless" regulation

simply moots the case.[2]

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2. It is true that even full compliance with the judgment below or the passage of an amended statute may not moot a case if the questioned conduct is likely to recur. See United States v. Concentrated Phosphate Export Association, Inc., 393 U.S. 199 (1968); United States v. W.T. Grant Co., 334 U.S. 629 (1953). The amended regulation in this case, however, comports with respondents' recent decisions that the accreditation requirement will apply "without deviation or exception." See In re Ferriman, supra; In re Kartorie, supra. Petitioner does not allege that any "waivers" have been granted since these decisions. Moreover, this Court should not assume that the highest court of the Commonwealth of Pennsylvania will not strictly enforce the explicit standards set forth in its decisions and regulations. It can be said with assurance that, even assuming a waiver policy did exist in the past, there is no "reasonable expectation" that it will recur in the future. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); SEC v. Medical Commission for Human Rights, 404 U.S. 403, 406 (1972). Mere speculation that the challenged conduct will recur is insufficient to establish the "immediacy and reality" that Article III demands. See Golden v. Zwickler, 394 U.S. 103, 108-10 (1969).

III. In addition, Petitioner's Claim Is Plainly Barred by Res Judicata.

Even if the mootness issue were in some sense worthy of the attention of this Court, no decision of the Court is likely to affect the outcome of this case since petitioner's claim is so plainly barred by the doctrine of res judicata. Having litigated the same facts and closely related legal theories in his first unsuccessful federal litigation, petitioner cannot retry the same issues by a minor change in his legal theory.

In Commissioner v. Sunnen, 333 U.S. 591 (1948), this Court explained the nature and operation of the doctrine of res judicata:

"The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."
Cromwell v. County of Sac, 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, "Res Judicata," 38 Yale L.J. 299; Restatement of the Law of Judgments, §§ 47, 48." 333 U.S. at 597. (Emphasis added.)

The Court has recently echoed these principles in Montana v. United States, 440 U.S. 147, 153-54 (1979), in which it reemphasized the salutary effects of the doctrine of res judicata.

Thus, the federal courts have held that a plaintiff cannot "split" his cause of action into various claims, all dependent on the same underlying rights, and pursue those claims seriatim. See, e.g., Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), cert. denied and appeal dismissed, 423 U.S. 908 (1975); Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464, 470 (3d Cir. 1950), cert. denied, 341 U.S. 921 (1951); 1B J. MOORE, FEDERAL PRACTICE §0.410 [2]; see also Gulf Oil Corp. v. Federal Power Commission, 563 F.2d 588, 602 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978).

Petitioner asserted below that the doctrine of res judicata did not bar his present suit because his due process claim herein stated a different "cause of action" than the cause of action already dismissed in the first federal suit. That assertion ignores the specific allegations of the first complaint as well as the applicable precedents relating to the definition of a "cause of action."

As the court aptly noted in Donegal Steel Foundry Co. v. Accurate Products Co., 516 F.2d 583, 588 n.10 (3d Cir. 1975), the term "'[c]ause of action' cannot be precisely defined, nor can a simple test be cited for use in determining what constitutes a cause of action for res judicata purposes." Nonetheless, the case law makes clear that

the res judicata effect of a prior determination cannot be avoided by "'clothing the claim in different garb.'" Valerio v. Boise Cascade Corp., 80 F.R.D. 626, 653 (N.D. Cal. 1978), quoting In re Orbitec Corp. v. Askew, 392 F. Supp. 633, 636 (S.D.N.Y. 1975); see also Aerojet-General Corp. v. Askew, supra, 511 F.2d at 718; Crawford v. Zeitler, 326 F.2d 119, 121 (6th Cir. 1964).

Here, it is patent that petitioner's present suit implicates the identical cause of action as did his previous federal suit. It is clear that petitioner challenges the identical alleged "liability creating conduct" of respondents as he did in the prior litigation, that is, their refusal to permit him to sit for the Pennsylvania Bar Examination.

As has previously been noted, petitioner specifically claimed in his first federal suit filed on February 7, 1977 that the practice of the State Board of Law Examiners in enforcing Rule 8-C-2 had interfered with his right "to be similarly treated as others under like circumstance" and "to be free from arbitrary and unreasonable action on the part of the Bar admitting authorities." Specifically, he claimed even then that the ABA-accreditation requirement had been "relaxed" in other instances, that under Rule 8-C-2 the Board was permitted "to treat applicants similarly situated in a different manner," and that the Board was given the ability to extend the rule in an "unwarranted and over-broad fashion" and to make it "vague, uncertain and indefinite."

Thus, the essential factual predicate for petitioner's claim in this

case is the same as that raised in his prior suit. Accordingly, the order of dismissal there bars this suit. See Berlitz Schools of Languages Inc. v. Everest House, 619 F.2d 211, 215 (2d Cir. 1980); Ellentuck v. Klein, 570 F.2d 414, 428 nn. 22, 23 (2d Cir. 1978).

Under these circumstances, petitioner's claim is as clearly barred by the doctrine of res judicata as it is moot.

CONCLUSION

For all of these reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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